No. 09-2359

In the United States Court of Appeals for the Fourth Circuit

OLIVA RUX, et al.
Plaintiffs-Appellants,
v.

REPUBLIC OF THE SUDAN,
Defendant-Appellee,
v.

UNITED STATES OF AMERICA,
Intervenor-Appellee/Amicus Curiae.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

BRIEF FOR THE UNITED STATES AS INTERVENOR-APPELLEE AND AMICUS CURIAE SUPPORTING AFFIRMANCE

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The United States files this brief as intervenor-appellee under 28 U.S.C. § 2403 and as amicus curiae under 28 U.S.C. § 517 and Federal Rule of Appellate Procedure 29(a). This suit arises out of the October 2000 Al Qaeda terrorist bombing of the U.S.S. Cole in the Port of Aden, Yemen. The United States strongly condemns that act of terrorism, which murdered 17 United States service members and injured many

others. In addition, the United States has the deepest sympathy for the plaintiffs in this action and their continued suffering from the loss of their family members. But, as explained below, we appear in this litigation to defend the broader interests of the United States. In particular, the United States appears as intervenor-appellee to defend the constitutionality of Section 1083(c) of the National Defense Authorization Act for Fiscal Year 2008 (NDAA), Pub. L. No. 110-181, 122 Stat. 3, against plaintiffs' equal protection challenge. And we appear as amicus curiae to support the district court's determination that the Death on the High Seas Act, 46 U.S.C. §§ 30301–30308, provides the exclusive remedy for plaintiffs' claims.

JURISDICTIONAL STATEMENT

The district court had jurisdiction under the Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. §§ 1330, 1605(a)(7). *See Rux v. Republic of Sudan*, 461 F.3d 461 (4th Cir. 2006). On July 25, 2007, the district court entered a final judgment, awarding eligible plaintiffs a total of $7,956,344 plus post-judgment interest, under the Death on the High Seas Act. J.A. 59; *see Rux v. Republic of Sudan*, 495 F. Supp. 2d 541, 567–69 (E.D. Va. 2007). Plaintiffs timely appealed from the district court's dismissal of their remaining claims. While the appeal was pending, Congress amended the FSIA and created a new federal right of action for injuries caused by acts of state-sponsored terrorism. *See* 28 U.S.C. § 1605A(c). This Court granted plaintiffs' motion to remand

the case to the district court for consideration of whether plaintiffs could rely on the new right of action. *Rux v. Republic of the Sudan*, No. 07-1835 (July 14, 2007). On December 3, 2009, the district court entered an order denying plaintiffs' motion to supplement their complaint with a claim under the new right of action. J.A. 253. Plaintiffs filed a timely notice of appeal five days later. J.A. 273. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Whether the classifications in NDAA Section 1083(c) violate plaintiffs' equal protection rights under the Fifth Amendment because there is assertedly no rational basis for the provisions' classifications.

2. Whether the Death on the High Seas Act preempts decedents' survivors' state-law claims for intentional infliction of emotional distress.

STATEMENT OF THE CASE AND OF THE FACTS

1. This suit involves two separate statutory schemes.

a. Plaintiffs' equal protection challenge concerns Section 1083(c)(2) of the NDAA, a provision that implemented changes to the so-called terrorism exception to foreign sovereign immunity. Under the Foreign Sovereign Immunities Act, foreign states are immune from civil suit in the United States unless a claim comes within specified exceptions. 28 U.S.C. §§ 1604, 1605–07. And district courts lack subject

matter jurisdiction over civil suits against foreign states unless the suit involves claims coming within an exception to foreign sovereign immunity. *Id.* § 1330. When a state is subject to suit under an exception to immunity, "the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances." *Id.* § 1606.

Before the NDAA's enactment, 28 U.S.C. § 1605(a)(7) (2006) created an exception to a foreign state's immunity from suit for certain acts of state-sponsored terrorism, provided that the state had been designated by the Secretary of State as a state sponsor of terrorism. Some plaintiffs who sued foreign states for injuries caused by acts of terrorism argued that the terrorism exception not only waived a state's immunity from suit, but also created a right of action against the foreign state. *See Cicippio-Puleo v. Islamic Republic of Iran*, 353 F.3d 1024, 1028 (D.C. Cir. 2004). Some plaintiffs also relied on the Flatow Act for their right of action against the foreign state. *Ibid.* By its terms, the Flatow Act creates a right of action for terrorism-related injuries against an "official, employee, or agent of a foreign state designated as a state sponsor of terrorism." Foreign Operations, Export Financing, and Related Appropriations Act of 1997, Pub. L. No. 104-208, § 589, 110 Stat 3009, 3009-172 (1996). In 2004, the D.C. Circuit held that "neither 28 U.S.C. § 1605(a)(7) nor the Flatow [Act], nor the two considered in tandem, creates a private right of action against a foreign

government." *Cicippio-Puleo*, 353 F.3d at 1033. After *Cicippio-Puleo*, plaintiffs in suits brought under the terrorism exception typically asserted claims under state tort law. *See, e.g., Dammarell v. Islamic Republic of Iran*, 404 F. Supp. 2d 261, 270 (D.D.C. 2005); *see* 28 U.S.C. § 1606 (foreign states liable to same manner and extent "as a private individual under like circumstances).

In 2008, Congress amended the terrorism exception to foreign sovereign immunity by repealing the old exception and enacting a new provision. *See* NDAA, Section 1083(a)(1) (to be codified at 28 U.S.C. § 1605A (Supp. II 2008)).[1] Like the former terrorism exception, the new provision eliminates the immunity of designated state sponsors of terrorism for certain acts of terrorism. 28 U.S.C. § 1605A(a)(1). However, Congress responded to the D.C. Circuit's *Cicippio-Puleo* decision by enacting for the first time a federal right of action against state sponsors of terrorism. *Id.* § 1605A(c); *see* 154 Cong. Rec. S54, S55 (Jan. 22, 2008) (statement of Sen. Lautenberg). The right of action provides that "damages may include economic damages, solatium, pain and suffering, and punitive damages." *Id.* at 1605A(c).

Congress also enacted transition rules to permit plaintiffs with pending terrorism damages cases and plaintiffs who might otherwise have been barred by the applicable

[1] All references to 28 U.S.C. § 1605A are to that section as it will be codified in Supplement II (2008).

statue of limitations from bringing suit to rely on this new right of action. NDAA Section 1083(c)(2) authorizes plaintiffs who had brought "prior actions" under the old terrorism exception to convert their action into one under the new federal right of action if four conditions are met: (1) the prior action must have been brought under the old terrorism exception or the Flatow Act before the NDAA was enacted; (2) plaintiffs must have relied upon the old terrorism exception or the Flatow Act as a right of action; (3) plaintiffs must have been adversely affected by that reliance; and (4) the action must be pending in any form as of the date of the NDAA's enactment. Even if these conditions were not met, Congress additionally authorized plaintiffs to file "related actions" under the new right of action if their claims arise out of the same terrorist act that is the subject of a separate suit timely brought under the old terrorism exception. NDAA § 1083(c)(3).[2]

Congress imposed time limits on conversions under Section 1083(c)(2) and the bringing of related actions under Section 1083(c)(3). Plaintiffs with pending cases could covert their suits to ones under the new terrorism exception only if they filed an appropriate motion within 60 days of the NDAA's enactment. NDAA § 1083(c)(2)(C). Plaintiffs may bring a related action only if they file suit no later than 60 days after either the NDAA's enactment or entry of judgment in the pending, related suit.

[2] NDAA Section 1083(c)(2) and (3) are reprinted in the addendum to this brief.

NDAA § 1083(c)(3). Because Section 1083(c)(3) permits plaintiffs to bring related actions within 60 days of either "the date of the entry of judgment in the original action" or the date of the NDAA's enactment, a plaintiff who might otherwise be barred by the new terrorism exception's statute of limitations (*see* 28 U.S.C. § 1605A(b)) might be able to bring a timely related action. This appears to be the principal practical difference between related actions and actions brought under the new terrorism right of action without regard to the transition rules.

In sum, under the 2008 amendment to the then-existing state sponsor of terrorism immunity exception, Congress provided that under certain circumstances pending cases could be converted and allowed to proceed under the new 2008 provision. Alternatively, if those circumstances could not be met, terrorism victims could nevertheless bring new related actions if timely filed.

b. The second statutory scheme at issue in this appeal relates to plaintiffs' argument that the district court erred in dismissing their state-law claims for intentional infliction of emotional distress. In addition to asserting emotional distress claims, plaintiffs asserted maritime wrongful death claims, and claims under the Death on the High Seas Act (DOHSA), 46 U.S.C. §§ 30301–30308. J.A. 60. DOHSA is a wrongful death statute that creates a right of action for the "death of an individual * * * caused by wrongful act, neglect, or default occurring on the high seas beyond 3 nautical miles

from the shore of the United States." 46 U.S.C. § 30302. The statute authorizes a decedent's personal representative to bring an admiralty action seeking damages "for the exclusive benefit of the decedent's spouse, parent, child, or dependent relative." *Ibid*. DOHSA permits recovery of only "pecuniary loss sustained by the individuals for whose benefit the action is brought." *Id*. § 30303.

2. This is an action brought against the Republic of Sudan by 59 relatives of the 17 U.S. Navy sailors murdered in the Al Qaeda terrorist attack on the U.S.S. Cole, which occurred in October 2000 in the Port of Aden, Yemen. Plaintiffs brought suit against Sudan in 2004 under the old state-sponsor of terrorism exception.[3] Plaintiffs alleged that Sudan had provided material support to Al Qaeda in the years prior to the Cole bombing. J.A. 59. After initially defaulting, Sudan appeared and sought dismissal on various grounds, including plaintiffs' supposed failure to allege sufficient jurisdictional facts to bring their case within the FSIA's terrorism exception. *Id*. at 59–60.

The district court denied Sudan's motion to dismiss. *Rux v. Republic of Sudan*, No. 04-428 (E.D. Va. Aug. 26, 2005). Sudan appealed from the district court's

[3] As noted, a suit could properly proceed under the old terrorism exception only if the state had been designated a state sponsor of terrorism. The Secretary of State designated the Republic of Sudan a state sponsor of terrorism in 1993. Department of State, Determination Sudan, 58 Fed. Reg. 52523-01 (Oct. 8, 1993).

jurisdictional ruling and sought to have this Court exercise pendent appellate jurisdiction over other questions the district court had decided.[4] This Court affirmed the district court's determination that plaintiffs had established jurisdiction under the terrorism exception, and it declined to exercise pendent appellate jurisdiction and so dismissed the remainder of Sudan's appeal. *Rux v. Republic of Sudan*, 461 F.3d 461 (4th Cir. 2006).

3. On remand, Sudan informed the district court that it would "'not defend or otherwise participate in this proceeding on the merits.'" J.A. 60 (quoting letter from Sudan). The FSIA permits entry of a default judgement against a foreign state only after "the claimant establishes his claim or right to relief by evidence satisfactory to the court." 28 U.S.C. § 1608(e). Considering plaintiffs' evidence, the district court determined that Sudan had provided material support to Al Qaeda, leading to the murder of the 17 U.S. Navy sailors. J.A. 61.

As noted, plaintiffs asserted claims under DOHSA, state-law claims for intentional infliction of emotional distress, and maritime wrongful death claims. J.A. 60. Over plaintiffs' objection, the district court determined that DOHSA provides the

[4] An order denying a motion to dismiss on foreign sovereign immunity grounds is an immediately appealable collateral order. *See, e.g., Eckert Int'l, Inc. v. Gov't of the Sovereign Democratic Republic of Fiji*, 32 F.3d 77, 79 (4th Cir.1994).

exclusive remedy for plaintiffs' claims.[5] J.A. 96–101. As the district court explained, the Supreme Court has held that "'[b]y authorizing only certain surviving relatives to recover damages, and by limiting damages to the pecuniary losses sustained by those relatives, Congress provided the exclusive recovery for deaths that occur on the high seas' and therefore 'has precluded the judiciary from enlarging either the class of beneficiaries or the recoverable damages' under DOHSA." *Id.* at 98 (quoting *Dooley v. Korean Air Lines Co., Ltd.*, 524 U.S. 116, 123 (1998)). Accordingly, the district court dismissed plaintiffs' maritime and state-law tort claims. *Id.* at 101. Because DOHSA permits recovery for only pecuniary loss (46 U.S.C. § 30303) and limits the class of eligible plaintiffs to a "decedent's spouse, parent, child, or dependent relative," (*id.* §

[5] DOHSA creates a right of action for death "occurring on the high seas beyond 3 nautical miles from the shore of the United States." 46 U.S.C. § 30302. Courts that have addressed the question have held that DOHSA applies to claims, such as those in this case, for death occurring in the territorial waters of a foreign state. Even though territorial waters are not "the high seas," those courts have held that DOHSA applies to claims arising in territorial waters because the cause of action arises "beyond 3 nautical miles from the shore of the United States." *Ibid.*; *see, e.g., In re Air Crash Off Long Island, New York, on July 17, 1996*, 209 F.3d 200, 211–12 (2d Cir. 2000) (discussing cases). This construction of DOHSA may or may not be correct, but is not at issue in this case because Sudan has not challenged the application of that statute as a basis for liability. *See also Rux*, 495 F. Supp. 2d at 560 ("Plaintiffs concede that DOHSA's geographic scope, as interpreted, includes foreign territorial waters and that the Port of Aden in Yemen falls within this scope.").

30302), the district court identified eligible plaintiffs and awarded them a total of $7,956,344.[6] J.A. 105–09.

4. Plaintiffs appealed from the district court's dismissal of their maritime and state-law tort claims. As discussed above, while the case was on appeal, Congress repealed the old terrorism exception and enacted the new federal right of action. As noted, in addition to providing for pecuniary loss, the new federal right of action permits recovery for "solatium, pain and suffering, and punitive damages." 28 U.S.C. § 1605A(c). Plaintiffs filed a motion seeking summary remand to the district court for consideration of whether they could seek non-pecuniary damages under the new right of action. This Court granted that motion. *Rux v. Republic of Sudan*, No. 07-1835 (July 14, 2009). This Court instructed that: "[o]n remand, the district court should determine whether FSIA's creation of a private right of action for state-sponsored terrorism takes preceden[ce] over DOHSA's remedy for death on the high seas when, as here, terrorism-related deaths occurred on the high seas. Following that determination, the court may, if warranted, reconsider its award of damages to Appellants." *Ibid.*

[6] According to plaintiffs' counsel, plaintiffs who were awarded damages have collected on their judgment. J.A. 257.

5. On remand, plaintiffs filed a motion for leave to supplement their complaint to add claims for non-pecuniary loss under the new federal right of action. J.A. 258. In an order that is the subject of the current appeal, the district court denied plaintiffs' motion to amend. *Id.* at 272. Following the D.C. Circuit, the district court determined that plaintiffs could convert this pending suit into a suit under the new federal right of action only if they met the four requirements for conversion contained in NDAA Section 1083(c)(2). J.A. 261–64 (discussing *Simon v. Republic of Iraq*, 529 F.3d 1187 (D.C. Cir. 2008), *rev'd on other grounds sub nom. Republic of Iraq v. Beaty*, 129 S. Ct. 2183 (2009)). But plaintiffs' suit does not satisfy those requirements, the district court held, because plaintiffs had not relied on the old terrorism exception or the Flatow Act as creating a right of action for their suit, as required by Section 1083(c)(2)(A)(ii). J.A. 265–66.

Plaintiffs conceded that "'literally applied,'" this statutory requirement would require denial of their motion to supplement their complaint. J.A. 267 (quoting Pls.' Supp. Mem. in Supp. of Mot. for Leave to Supp. Fourth Am. Compl. (Pls.' Supp. Mem.) 3). However, plaintiffs argued that this provision "discriminates against Plaintiffs by precluding them from seeking relief pursuant to § 1605A." J.A. 270 (quotation marks omitted). Plaintiffs further argued that the statutory requirement of prior reliance on the old terrorism exception or the Flatow Act "'is arbitrary and serves

no legitimate state purpose,' and thus 'it violates the guarantee of equal protection embodied in the Fifth Amendment.'" J.A. 267 (quoting Pls.' Supp. Mem. at 5). The district court rejected these arguments.

To prevail on their equal protection claim, the district court explained, plaintiffs must establish "that they 'were intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment.'" J.A. 267 (quoting *In re Premier Automotive Servs., Inc.*, 492 F.3d 274, 283 (4th Cir. 2007) (in turn quoting *Vill. of Willobrook v. Olech*, 528 U.S. 562, 564 (2000))). The district court held that the NDAA does treat plaintiffs here differently by preventing them from seeking relief under the new terrorism exception. As the court explained, even if plaintiffs could not convert their suit under Section 1083(c)(2), they could have filed a new, related action under Section 1083(c)(3), relying on the new terrorism exception. J.A. 270. Indeed, plaintiffs themselves argued that, if their attempt to replead failed, "'a new action [could] be filed under § 1083(c)(3).'" J.A. 268.

The district court further rejected plaintiffs' contention that Section 1083(c) employs irrational classifications. Plaintiffs argued that the statute creates irrational classifications because it would lead to different treatment of plaintiffs who were all injured by the same terrorist act. J.A. 268. The district court concluded, however, that this was not enough to show that plaintiffs subject to different statutory classifications

are "similarly situated" because the statutory distinctions turn on the different procedural postures of plaintiffs' suits. *Id.* at 268–69. Relying on the fundamental principle that Congress does not create invidious classifications simply by proceeding "'one step at a time,'" the district court concluded that Congress could rationally have determined that only certain plaintiffs with pending actions could convert those suits to ones under the new terrorism exception, while others would have to bring new, related actions. *Id.* at 269 (quoting *Williamson v. Lee Optical, Inc.*, 348 U.S. 483, 489 (1955)).

Moreover, in the district court's view, the NDAA raises separation-of-powers concerns, insofar as the statute possibly permits plaintiffs to reopen final judgments. J.A. 269–70 (citing *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 241 (1995)); *see* NDAA § 1083(c)(2)(A)(iv) (permitting conversion of actions pending "in any form," including those before a court on motion under Fed. R. Civ. P. 60(b)). The district court surmised that Congress may have sought to minimize potential constitutional difficulties by limiting the class of plaintiffs who could convert their pending actions (possibly even actions in which judgment had been entered) and requiring others to bring new actions. *Id.* at 270. The district court thus concluded that "Congress had ample reason to establish these distinct procedural avenues" for bringing suit under the new terrorism exception. *Ibid.* Accordingly, the court denied plaintiffs' motion to

amend their complaint to include claims under 28 U.S.C. § 1605A. Plaintiffs now appeal from this order.

SUMMARY OF ARGUMENT

I. In their opening brief, plaintiffs contest two aspects of the district court's prior decisions. Plaintiffs argue that Section 1083(c)(2) — the provision of the NDAA permitting conversion of certain pending suits to ones under the new terrorism exception — "creates an irrational distinction that impermissibly discriminates against Appellants by precluding them from bringing suit pursuant to § 1605A." Opening Br. 37. However, plaintiffs' argument necessarily fails because they could have brought, but did not, an action under Section 1605A had they filed a timely "related action" pursuant to NDAA Section 1083(c)(3).

In any event, plaintiffs' argument that the NDAA conversion provision creates irrational class distinctions fails on its own terms. That provision permits conversion of an action brought under the old terrorism exception to one brought under the new terrorism exception only if plaintiffs detrimentally relied on the old terrorism exception or the Flatow Act as creating a right of action. Plaintiffs contend that the provision is irrational because it would permit them to take advantage of the new terrorism exception only if they had asserted a frivolous claim under the old terrorism exception after it was clear that neither the exception nor the Flatow Act created a right of action.

But plaintiffs did not need to file a frivolous claim. They could have properly relied on the new terrorism exception by filing a related action pursuant to a different provision of the NDAA.

Plaintiffs next argue that the conversion provision creates irrational classifications because it could lead to different treatment for plaintiffs who have been injured in the same terrorist act. But as the district court correctly explained, the mere fact of different treatment is not evidence of irrationality. Congress could rationally have determined that cases in different procedural postures should be treated differently, and embodied that determination in the classifications within the conversion provision.

Plaintiffs further argue that the classification created by the conversion provision is irrational because it does not further Congress' purpose of eliminating obstacles plaintiffs faced when bringing suit under the prior terrorism exception. But equal protection principles do not require a perfect matching of means to ends; Congress may permissibly address the problems it identifies by proceeding one step at a time.

II. Plaintiffs argue that the district court erroneously concluded that DOHSA is plaintiffs' exclusive remedy, foreclosing their state-law claims for intentional infliction of emotional distress. Plaintiffs' argument is foreclosed by Supreme Court precedent.

DOHSA is a wrongful death statute that authorizes a decedent's personal representative to bring an admiralty action on behalf of a defined class of beneficiaries. It permits recovery of only pecuniary loss by the individuals for whom suit is brought. The Supreme Court has repeatedly held that where DOHSA applies, its remedial scheme is exclusive.

Plaintiffs attempt to distinguish the applicable Supreme Court precedent by arguing that the decisions recognize limits on an estate's ability to enlarge its own recovery for a wrongful death. They contend that DOHSA does not prevent plaintiffs from bringing state-law tort claims for their own non-pecuniary injuries caused by acts leading to a wrongful death. That argument is inconsistent with the Supreme Court's decision in *Dooley v. Korean Air Lines Co., Ltd.*, 524 U.S. 116 (1998).

The plaintiffs in *Dooley* presented the inverse of the argument plaintiffs make in this case. The *Dooley* plaintiffs acknowledged that a DOHSA action is for the benefit of certain surviving family members and that the remedies for those beneficiaries cannot be extended. But they argued that DOHSA did not preclude a decedent's estate from asserting a survival claim, which seeks compensation for the pain and suffering the decedent experienced prior to death.

The Supreme Court rejected that argument: "By authorizing only certain surviving relatives to recover damages, and by limiting damages to the pecuniary losses

sustained by those relatives, Congress provided the exclusive recovery for deaths that occur on the high seas." *Dooley*, 524 U.S. at 123. Accordingly, in actions involving death on the high seas, DOHSA "preclude[s] the judiciary from enlarging either the class of beneficiaries or the recoverable damages." *Id.* at 124. In asserting state-law tort claims for non-pecuniary loss, plaintiffs here attempt to expand both the class of beneficiaries and the recoverable damages. This attempt is squarely foreclosed by *Dooley*'s rationale.

STANDARD OF REVIEW

Whether Section 1083(c) violates equal protection principles and whether DOHSA provides plaintiffs' exclusive remedy are legal questions this Court reviews de novo. *See Grissom v. The Mills Corp.*, 549 F.3d 313, 318 (4th Cir. 2008).

ARGUMENT

I. NDAA SECTION 1083 DOES NOT VIOLATE PLAINTIFFS' EQUAL PROTECTION RIGHTS.

Plaintiffs' principal argument on appeal is that Section 1083(c)(2) — the provision of the NDAA permitting conversion of certain pending suits to ones under the new terrorism exception — "creates an irrational class distinction that impermissibly discriminates against Appellants by precluding them from seeking relief pursuant to § 1605A." Opening Br. 37. As the district court explained, plaintiffs are mistaken in

suggesting that the statutory classification prevented them from seeking relief under the new terrorism right of action. J.A. 270.

Although plaintiffs do not satisfy the requirements for converting their action under NDAA Section 1083(c)(2), plaintiffs could have filed, but did not, a new, "related action" under Section 1083(c)(3), since it would have been an "action arising out of the same act or incident" as that at issue in their current suit. Had plaintiffs filed a new, related action, they would have been able to rely on Section 1605A(c) to provide their new right of action. NDAA § 1083(c)(3) (related action "may be brought under section 1605A of title 28"); *see* J.A. 268 ("[T]here is little question that at the time of the NDAA's enactment, Plaintiffs could have pursued a claim [under Section 1083(c)(3)]. Plaintiffs were by no means precluded from seeking relief.").

The existence of one provision that would have permitted plaintiffs to seek relief under Section 1605A refutes their claim that a different provision is unconstitutionally discriminatory because it prevents them from seeking such relief. Plaintiffs' brief on appeal nowhere addresses the availability of relief under Section 1083(c)(3) and fails to engage the district court's holding that this provision is fatal to their constitutional claim. Indeed, plaintiffs' brief does not even cite Section 1083(c)(3). Because plaintiffs could have but "chose not to file [a] § 1083(c)(3) action within the time period set forth

in § 1083(c)(3)" (J.A. 268), plaintiffs' equal protection challenge to Section 1083(c) necessarily fails.[7]

In any event, plaintiffs' contention that the conversion provision creates irrational class distinctions is meritless. Plaintiffs contend that the conversion provision's requirement of past reliance on the old terrorism exception as creating a right of action creates three classes: (1) plaintiffs who have never filed an action under the prior terrorism exception; (2) plaintiffs who filed an action under the prior terrorism exception and relied on the exception as creating a right of action, before the D.C. Circuit held in *Cicippio-Puleo* that the exception did not provide a right of action; and (3) plaintiffs who filed an action under the prior terrorism exception after *Cicippio-Puleo* and who did not rely on the exception for their right of action. Opening Br. 37. According to the plaintiffs, the provision "rewards" plaintiffs in the first two classes but denies relief to those in the third class. *Id.* at 37–38.

Because plaintiffs do not contend they are members of a suspect class or that the statute burdens a fundamental right, their equal protection challenge is analyzed under

[7] As the district court suggests, plaintiffs may not now bring a related action under Section 1083(c)(3) because such an action must be brought within 60 days of either the entry of judgment in the prior action (which occurred here in July 2007) or of the date of the NDAA's enactment on January 28, 2008. NDAA § 1083(c)(3); *see* J.A. 268 & n.8.

rational-basis review. Under that standard, "legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest." *Lawrence v. Texas*, 539 U.S. 558, 579 (2003) (addressing Equal Protection Clause of the Fourteenth Amendment); *see Buckley v. Valeo*, 424 U.S. 1, 93 (1976) ("Equal protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment.").

Plaintiffs identify three reasons for the supposed irrationality of the conversion provision. First, they contend that the distinctions are irrational because it would have been frivolous for plaintiffs to have relied after *Cicippio-Puleo* on the prior terrorism exception as creating a right of action. Opening Br. 38. But contrary to their suggestion, plaintiffs here would not have had to make frivolous arguments in their underlying suit to be able to have relied on the new federal cause of action. As explained, plaintiffs could have filed a related action under Section 1083(c)(3).[8]

Second, plaintiffs contend that the classifications in the conversion provision are irrational because plaintiffs injured by the same terrorist act could fall into different classes, resulting in disparate treatment. Opening Br. 38. But, as the district court

[8] Moreover, *Cicippio-Puleo* was decided by the D.C. Circuit, not by this Court. Thus, it is not obvious that plaintiffs here would have made frivolous arguments by relying on the old terrorism exception as creating a right of action, even if this Court ultimately agreed with the D.C. Circuit.

concluded, the fact that the statute creates classifications that might treat plaintiffs differently even though they were all affected by the same terrorist act is itself no reason to think that the classifications are irrational. *See* J.A. 268. Any statute of limitations, for example, necessarily distinguishes between plaintiffs who bring suit before the deadline and those who bring suit after, even if plaintiffs in both classes were injured by the same act. So long as Congress has a rational basis for creating the statutory classification it employs, classifications may permissibly treat differently those injured by the same act. Plaintiffs make no attempt to show that Congress lacked a rational basis for treating plaintiffs injured by the same act differently under the classifications created in the conversion and related action provisions. Because "legislation is presumed to be valid" (*Lawrence*, 539 U.S. at 579) unless plaintiffs establish the classification's irrationality, plaintiffs cannot establish an equal protection violation merely by pointing to the fact that a classification will lead to disparate treatment of those similarly injured.

Third, plaintiffs suggest that the classification created by the conversion provision is irrational because it does not serve Congress' purpose of "righting the many procedural difficulties that had arisen for plaintiffs in recovering judgments under § 1605(a)(7)." Opening Br. 39. Plaintiffs' final argument amounts to the claim that Section 1083(c) does not perfectly advance Congress' aim of eliminating the

difficulties attendant to suit under the former terrorism exception. But equal protection does not require a perfect matching of means to ends. This is the central teaching of the Supreme Court in *Williamson v. Lee Optical, Inc.*, as the district court noted. J.A. 269; *see* 348 U.S. at 489. Congress may permissibly seek to remedy a perceived problem without defining categories with mathematical precision and without eliminating every difficulty it sought to address.

Finally, plaintiffs here do not make any attempt to show that it was irrational for Congress to permit some plaintiffs to convert their actions (under Section 1083(c)(2)) while requiring others to file new actions (under Section 1083(c)(3)). Accordingly, they have waived that argument. *See United States v. Abdelshafi*, 592 F.3d 602, 609 n.6 (4th Cir. 2010). But such an argument could not succeed in any event. As the district court noted, to be a member of the class created by the conversion provision, a plaintiff necessarily had to erroneously and adversely have relied on the former terrorism exception as creating a valid right of action. J.A. 268–69; NDAA § 1083(c)(2)(A)(ii), (iii). By contrast, the class created by the related action provision includes those, like plaintiffs here, who relied on a valid right of action. NDAA § 1083(c)(3). Congress may permissibly have believed that plaintiffs with valid rights of action are more likely to have succeeded in pursuing their claims to a successful judgment than those who asserted invalid claims, and that those in the latter class should be given the extra

advantage of converting their existing pending claims into ones under the new federal right of action rather than put to the burden of filing a new suit. *See* J.A. 269.

This conclusion is further supported by the fact that the advantage Congress conferred raises possible constitutional issues. Members of both the conversion and related action classes might have final judgments under the prior terrorism exception. *See* NDAA § 1083(c)(2)(A)(iv) (permitting conversion of suits pending "before the courts in any form, including * * * [a] motion under Rule 60(b) of the Federal Rules of Civil Procedure"); *id.* § 1083(c)(3) (permitting related actions without regard to whether plaintiff previously obtained a judgment under prior terrorism exception); *see also id.* § 1083(c)(2)(B) (waiving rules of res judicata and collateral estoppel in actions converted under Section 1083(c)(2)(A) or refiled under Section 1083(c)(3)). As the district court recognized, statutes directing courts to reopen final judgments raise separation-of-powers concerns. J.A. 269–70 (citing *Plaut*, 514 U.S. at 241). Authorizing a plaintiff to "convert" a final judgment to one under a new right of action and giving that judgment "effect as if the action had originally been filed" under the new right of action (NDAA § 1083(c)(2)) raises greater constitutional concern than creating a new right of action and extending the statute of limitations for a class of plaintiffs (*see* NDAA § 1083(c)(3)). Thus, Congress may have been particularly wary

about extending a right to convert too broadly, thus increasing the risk that the legislation would be held constitutionally infirm. *See* J.A. 260–70.

In enacting the NDAA, Congress created a new federal right of action for terrorism-related claims against foreign states, and it provided for rules under which some plaintiffs with pending cases could convert their suits to ones under the new right of action, and other rules by which plaintiffs could bring new cases under the new provision that are factually related to pending cases. The distinctions Congress employed are rationally related to Congress' objective of providing plaintiffs access to the new remedy, taking into account the procedural posture of their claims at the time of the statute's enactment. This is all that equal protection principles require.

Because plaintiffs are not eligible to rely on the new federal right of action, and because the eligibility criteria do not violate plaintiffs' equal protection rights, the district court properly denied plaintiffs' motion to supplement their complaint.

II. THE DEATH ON THE HIGH SEAS ACT PROVIDES PLAINTIFFS' EXCLUSIVE REMEDY.

The district court held that DOHSA precludes plaintiffs' state-law claims for intentional infliction of emotional distress. J.A. 96–101. Plaintiffs contend that the district court erred and that DOHSA does not preclude their emotional distress claims because "DOHSA supplies a wrongful death action to the decedent's estate." Opening

Br. 21. By contrast, a decedent's family member's claim for intentional infliction of emotional distress is an "independent tort[]," belonging to the family member and concerning the family member's own injuries, "that do[es] not fall within the subject matter of a DOHSA wrongful death action." *Id.* at 23; *see id.* 27–29. Accordingly, plaintiffs contend, DOHSA does not preempt such a claim. *Id.* at 24–25.

DOHSA is a wrongful death statute that authorizes a decedent's personal representative to bring an admiralty action "for the exclusive benefit of the decedent's spouse, parent, child, or dependent relative" for damages for death on the high seas "caused by wrongful act, neglect, or default." 46 U.S.C. § 30302. The statute permits recovery of only "pecuniary loss sustained by the individuals for whose benefit the action is brought." *Id.* § 30303.

The Supreme Court has repeatedly held that where DOHSA applies, its remedial provisions are exclusive and cannot be enlarged. Thus, the Court has rejected attempts to obtain damages for "loss of society," either under federal maritime common law, or under state wrongful death statutes. *See Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618 (1978) (maritime common law); *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207 (1986) (state wrongful death statutes); *see also Sea-Land Servs., Inc. v. Gaudet*, 414 U.S. 573, 586 (1974) (loss of society includes loss of "a broad range of mutual benefits each family member receives from the others' continued existence, including love, affection, care,

attention, companionship, comfort, and protection"), *superseded by statute on other grounds by* Pub. L. No. 92-576, 86 Stat. 1251 (1972). The Supreme Court has similarly held that survival claims for a decedent's pre-death pain and suffering are precluded. *Dooley v. Korean Air Lines Co., Ltd.*, 524 U.S. 116 (1998). The district court relied on this precedent in holding that DOHSA provides plaintiffs' exclusive remedy. J.A. 96–101.

Plaintiffs attempt to distinguish these decisions by arguing that they only limit the estates of a decedent from enlarging the estate's recovery for the wrongful death. Petitioners contend that nothing in DOHSA or the Supreme Court cases construing it precludes plaintiffs from bringing state-law tort actions for their own non-pecuniary injuries caused by the act leading to a decedent's death. Opening Br. 30–32. This distinction is unavailing; the Supreme Court's *Dooley* decision squarely forecloses plaintiffs' argument.

In *Dooley*, petitioners sought to assert a maritime survival claim under which a decedent's estate could "recover damages that the decedent would have been able to recover but for his death, including pre-death pain and suffering." *Dooley*, 524 U.S. at 123. Just as plaintiffs argue here concerning their emotional distress claims, the plaintiffs in *Dooley* argued that a survival claim is available because it remedies a

different injury than that addressed by DOHSA. *Ibid.* ("[Plaintiffs contend that] because DOHSA is a wrongful-death statute — giving surviving relatives a cause of action for losses *they* suffered as a result of the decedent's death — it has no bearing on the availability of a survival action [to recover for the decedent's pre-death pain and suffering].").

However, the Supreme Court understood that recognizing a survival action "would necessarily expand the class of beneficiaries in cases of death on the high seas by permitting decedents' estates (and their various beneficiaries) to recover compensation," outside of DOHSA and without regard to DOHSA's limitations on beneficiaries. *Ibid.* For that reason, the Court held that such a claim is precluded by DOHSA: "DOHSA expresses Congress' judgment that there should be no such cause of action in cases of death on the high seas. By authorizing only certain surviving relatives to recover damages, and by limiting damages to the pecuniary losses sustained by those relatives, Congress provided the exclusive recovery for deaths that occur on the high seas." *Ibid.* Thus, DOHSA "preclude[s] the judiciary from enlarging either the class of beneficiaries or the recoverable damages." *Id.* at 124; *see also Higginbotham*, 436 U.S. at 625 ("In the area covered by the statute, it would be no more appropriate to prescribe a different measure of damages than to prescribe a different statute of limitations, or a different class of beneficiaries.").

Plaintiffs here seek to expand the class of beneficiaries to include the decedents' survivors not covered by the statute. *See, e.g.*, Opening Br. 27. They also seek to expand the available rights of action relating to injury caused by death on the high seas to include state-law intentional infliction of emotional distress. *See id.* at 28–29. Because "Congress provided the exclusive recovery for deaths that occur on the high seas" (*Dooley*, 524 U.S. at 123), and because DOHSA does not encompass the claim plaintiffs propose, the district court correctly dismissed plaintiffs' claims for intentional infliction of emotional distress.[9]

[9] Because plaintiffs failed to file a related action under NDAA Section 1083(c)(3), this appeal does not present the question whether a plaintiff could properly rely on the new terrorism right of action created by 28 U.S.C. § 1605A(c) in a suit in which DOHSA would otherwise apply.

CONCLUSION

For the foregoing reasons, the Court should affirm the district court's denial of plaintiffs' Motion for Leave to Supplement Their Fourth Amended Complaint.

Respectfully submitted,

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ADDENDUM

Section 1083(c) of the National Defense Authorization Act for Fiscal Year 2008 (NDAA), Pub. L. No. 110-181, 122 Stat. 3, provides in part:

> (2) PRIOR ACTIONS. –
>
> (A) IN GENERAL. – With respect to any action that –
>
> (I) was brought under section 1605(a)(7) of title 28, United States Code, or section 589 of the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1997 (as contained in section 101(c) of division A of Public Law 104–208), before the date of the enactment of this Act,
>
> (ii) relied upon either such provision as creating a cause of action,
>
> (iii) has been adversely affected on the grounds that either or both of these provisions fail to create a cause of action against the state, and
>
> (iv) as of such date of enactment, is before the courts in any form, including on appeal or motion under rule 60(b) of the Federal Rules of Civil Procedure,
>
> that action, and any judgment in the action shall, on motion made by plaintiffs to the United States district court where the action was initially brought, or judgment in the action was initially entered, be given effect as if the action had originally been filed under section 1605A(c) of title 28, United States Code.
>
> (3) RELATED ACTIONS. – If an action arising out of an act or incident has been timely commenced under section 1605(a)(7) of title 28, United States Code, or section 589 of the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1997 (as contained in section 101(c) of division A of Public Law 104–208), any other action arising out of the same act or incident may be brought under section 1605A of title 28, United States Code, if the action is commenced not later than the latter of 60 days after –
>
> (A) the date of the entry of judgment in the original action; or
>
> (B) the date of the enactment of this Act.

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify that this brief uses proportionately spaced font and contains 6,647 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). I further certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) because this brief has been prepared in a proportionally spaced typeface using WordPerfect X4, in 14 point Goudy Old Style.

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March 8, 2010

CERTIFICATE OF SERVICE

I certify that on March 8, 2010 the foregoing document, Brief for the United States as Intervenor Appellee and Amicus Curiae Supporting Affirmance, was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

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